Hogan Lovells

Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004

Neal Kumar Katyal
T +1 202 637 5600
F +1 202 637 5910
neal.katyal@hoganlovells.com

Supreme Court, U.S.
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Honorable Scott S. Harris
Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

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SUPREME COURT, U.S.

Re: *Donald J. Trump, et al.* v. *State of Hawaii, et al.*, No. 16-1540

Dear Mr. Harris,

This letter is in response to the Court's order of September 25, 2017, requesting letter briefs from the parties addressing "whether, or to what extent, the Proclamation issued on September 24, 2017, may render cases No. 16-1436 and 16-1540 moot" and "whether, or to what extent, the scheduled expiration of Sections 6(a) and 6(b) of Executive Order No. 13780 may render those aspects of case No. 16-1540 moot." In brief, neither of these developments renders the existing dispute moot, and the Court may continue to hear the case. But if the Court deems it imprudent to address the questions presented in this posture, the proper course is to dismiss the petition as improvidently granted and permit the parties to litigate their dispute in the context of the Proclamation ("EO-3").

The "voluntary cessation of a challenged practice" does not moot a controversy unless and until the Government makes it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (internal quotation marks omitted). Here, the Government has not even ceased to implement all of the challenged portions of Executive Order No. 13,780 ("EO-2"), as the refugee bar in Section 6(a) remains in place. But even if Section 6(a) is permitted to expire on October 24, the Government cannot come close to meeting its "heavy burden" to demonstrate that the bans will not be revived. *Id.* The Government has previously informed this Court that the President is free to revise the "temporal scope" of EO-2 whenever he wishes. Pet. Br. 37. And the President

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himself has expressed his desire to return to a "much tougher version" of the bans.[1] Indeed, by issuing EO-3, he has *already* reinstated many of the exclusions imposed by Section 2(c) of EO-2. The controversy therefore is not moot, and the Court can and should review the existing challenge to EO-2.

Nonetheless, if the Court determines that it is not prudent to resolve the important questions presented in this posture, the writ of certiorari should be dismissed as improvidently granted. The Court has often taken this course where the statute or order under review is altered during the pendency of the case. And because challenges to EO-3 are already underway in the lower courts, the Court will soon have another opportunity to determine the legality of the President's actions in the context of the new order.

No matter which course it takes, this Court should not vacate the decisions below. Because the case is not moot, there is no justification for vacatur. And even if this Court were to conclude that the case is moot, vacatur would be inappropriate. Any mootness would be entirely the consequence of the Government's voluntary actions—in managing the timing of the bans, in declining to seek a swift hearing on the merits, and in rebottling its old ban in a new order. It would be profoundly inequitable to permit the Government to use these maneuvers to obtain the very relief it sought on the merits: vacatur of the injunctions.

I. THIS CASE IS NOT MOOT AND THE COURT SHOULD HEAR THE CASE ON THE MERITS.

"A case becomes moot * * * when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013) (internal quotation marks omitted). A defendant claiming mootness as a result of its voluntary cessation of the challenged conduct has the "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not be expected to recur." *Id.* (quoting *Friends of the Earth*, 528 U.S. at 190). And even if a case appears to be mooted by the passage of time, it remains justiciable when the controversy is "capable of repetition, yet evading review." *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969, 1976 (2016). Under these principles, this case is not moot and the Court should adjudicate it on the merits.

1. At a bare minimum, the issues presented remain "live" because EO-2 continues to bar refugees from entering the country under Section 6(a). The refugee ban inflicts the same harm on the State of Hawaii and the individual plaintiffs that it has since the outset: It impedes Hawaii's refugee resettlement programs,

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[1] Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017, post uploaded 6:37 A.M. E.S.T.), https://twitter.com/realdonaldtrump.

denigrates Dr. Elshikh and Doe as Muslims, and robs the State of its constitutional right to bar an establishment of religion.

Nor is it certain that this live controversy will conclude on October 24, 2017, when the 120-day period set forth in Section 6(a) is currently scheduled to end. Section 6(a) itself contemplates that "travel of refugees into the United States under USRAP" may only partially "resume" when the 120 days are up. Moreover, the Government's merits brief was conspicuously silent as to whether the travel and refugee bans would be permitted to expire in accordance with the terms of EO-2. Instead of guaranteeing termination dates, the Government asserted that the President could revise the "temporal scope" of EO-2 at will, as he had done through the June 14 memorandum declaring that the bans would not terminate within 90 or 120 days of the "effective date" announced in the Order's text. Pet. Br. 36-37.

In the end, the "90 day" travel ban ended 193 days after the "effective date" specified in EO-2. Even then, the Government did not inform the Court of the expiration until the day it occurred, and that letter made no mention of the refugee ban or its scheduled expiration date. In these circumstances, it is impossible to say with any certainty that the refugee ban will conclude on October 24, 2017.

2. Even if the ban is permitted to expire on October 24, that cannot moot the case. "Voluntary cessation does not moot a case or controversy unless subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (internal quotation marks omitted). The Government cannot meet its "heavy burden" to demonstrate that the President will not reimpose the policies announced in Section 2(c) and Section 6(a) of EO-2, or again lower the refugee cap midyear as in Section 6(b). *Id.*

In the past, this Court has held that a case is not moot where the government simply "announce[s]" the conclusion of a challenged policy, *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2019 n.1 (2017), while continuing to "vigorously defend[] [its] constitutionality," *Parents Involved*, 551 U.S. at 719. And it has held that a finding of mootness is particularly improper where the government proclaims an intention to reenact "the same provision," *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 289 & n.11 (1982), or has already enacted a strikingly similar policy to replace the one it allegedly abandoned, *Ne. Fla. Chapter of Associated Gen. Contractors of Am.* v. *City of Jacksonville, Fla.*, 508 U.S. 656, 662 (1993).

This case features *all* of those elements. The Government has announced that the travel ban in Section 2(c) will no longer be enforced, but it has continued to defend the legality of that ban, and indeed continues to enforce the refugee ban in Section 6(a) that the lower courts enjoined based on the same legal flaws that were

present in Section 2(c). Moreover, the President has repeatedly expressed a desire not simply to "reenact" the bans in EO-2, but rather to implement a "much tougher version." And on the very day that he permitted EO-2's travel ban to expire, the President proclaimed a new travel ban that replicates the constitutional and statutory defects of the first, *see infra* pp. 5-6.

3. In addition, this controversy falls within the mootness exception for disputes that are "capable of repetition, yet evading review." *FEC* v. *Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007). Particularly given the Government's unwillingness to seek expedited consideration of the case, "it would be entirely unreasonable" to expect respondents to have obtained complete judicial review of EO-2 within the asserted span of the bans. *Id.* (internal quotation marks omitted). Furthermore, both Hawaii and Dr. Elshikh (who has several other family members in Syria) have a "reasonable expectation that [they] will again be subjected to the alleged illegality." *Id.* at 463 (internal quotation marks omitted); *see* Resp. Br. 25-26. EO-3 is already subjecting respondents to many of the same harms as EO-2: It separates Dr. Elshikh and Doe from their relatives, *see* EO-3 § 2(e), (g), and excludes tourists, students, and other visitors from the State, *id.* § 2.

In sum, the parties retain a live dispute regarding the legality of EO-2. Accordingly, this Court should once again set the case for argument and adjudicate the legality of the President's ongoing effort to usurp Congress's power over immigration and unilaterally ban hundreds of millions of foreign nationals—the overwhelming majority of them Muslim—from the United States.

II. IN THE ALTERNATIVE, THE COURT SHOULD DISMISS THE WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED.

Alternatively, if the Court deems it preferable to decide the important legal questions posed by both EO-2 and EO-3 in the context of the more recent order, it may dismiss the present writ of certiorari. It could then grant review, as appropriate, once the lower courts have decided the legal issues as they apply to the particular facts of EO-3.

This Court has often taken this course where a statute or order under review is modified or repealed during the pendency of a case. In *Sanks* v. *Georgia*, 401 U.S. 144 (1971), for instance, the Court noted probable jurisdiction to review whether Georgia's tenancy laws were constitutional. Subsequently, however, the State "repealed virtually the entire statutory scheme * * * and replaced it with a new one." *Id.* at 147. Although the Court did "not * * * determin[e] that the case [wa]s moot," it could "perceive no other responsible course for this Court than to decline * * * to adjudicate the issues originally presented," in light of the "fundamental principle" that the Court should "exercise [its] powers of judicial review only as a matter of necessity." *Id.* at 150-151.

Likewise, in *Triangle Improvement Council* v. *Ritchie*, 402 U.S. 497 (1971) (per curiam), the Court dismissed a case as improvidently granted where the federal statute under review was "repealed," and "a new statute * * * enacted" in its place, subsequent to the grant of certiorari. *Id.* at 498-499 (Harlan, J., concurring). Several Justices dissented on the ground that the new statute was "so similar to the [old one] that any necessary interpretation of the [old statute] would be equally applicable to the" new one. *Id.* at 504 n.1 (Douglas, J., dissenting). But as Justice Harlan explained, the statutes' similarity "d[id] not increase, but rather further diminishe[d], the appropriateness of [the Court's] ruling in the instant case." *Id.* at 501. The Court, he reasoned, should instead "await a case arising under the new statute," where it would "have the benefit of the thinking of lower federal courts" and could issue a definitive holding "govern[ing] the administration of the" statute. *Id.*

This Court has applied the same principle repeatedly since. *See Morris* v. *Weinberger*, 410 U.S. 422, 422 (1973) (per curiam) (dismissing case because "Congress amended the relevant statutory provisions"); *Cook* v. *Hudson*, 429 U.S. 165, 165-166 (1976) (per curiam) (dismissing writ in light of a statute enacted "after the * * * action here complained of"); *see also Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 108-109 (2001) (per curiam); *Rice* v. *Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955). Most recently, in *Medellin* v. *Dretke*, 544 U.S. 660 (2005) (per curiam), the Court dismissed a case as improvidently granted because—much like here—the President issued an order "[m]ore than two months after [the Court] granted certiorari" that purported to resolve the questions presented. *Id.* at 663-664; *but see Medellin* v. *Texas*, 552 U.S. 491, 523-532 (2008) (concluding, on subsequent review, that the order exceeded the President's authority).

If the Court does not wish to hear the present case in this posture, it should follow the same approach. Months after this Court granted review, the President issued EO-3, which largely "replace[s]" the previous "scheme * * * with a new one." *Sanks*, 401 U.S. at 147. While the issuance of that order does not moot the controversy with respect to the EO-2, it is nonetheless entirely proper for the Court to "await a case arising under the new [order]" to adjudicate the questions presented. *Triangle Improvement Council*, 402 U.S. at 501 (Harlan, J., concurring). That would enable this Court to obtain the considered views of the lower courts on EO-3's legality.

At the same time, dismissing the case would not prevent the Court from ultimately passing on the legal questions it granted certiorari to consider. EO-3 suffers from almost all of the same legal flaws as EO-2: The new order continues to flout Congress's directive that "no person shall * * * be discriminated against in the issuance of an immigrant visa because of the person's * * * nationality." 8 U.S.C. § 1152(a)(1)(A); *see* EO-3 § 2; Resp. Br. 44-46. It deepens the President's unprecedented assertion of authority under Section 1182(f) by imposing an

indefinite ban on aliens who do not resemble any of the three classes restricted by Presidents for the past century, and in the absence of any claim of an exigency in which it is impracticable for Congress to act. *See* Resp. Br. 40-44. And like EO-2, EO-3 is an outgrowth of the President's promised Muslim ban and imposes a set of restrictions designed to fulfill that promise. *See* Resp. Br. 54-56.

III. AT A MINIMUM, THE COURT SHOULD NOT VACATE THE JUDGMENTS BELOW.

Because the case is not moot, there is no basis for this Court to vacate the decisions below. But even if the Court were to find that the existing controversy is or soon will be moot, it should leave the lower court decisions in place. "It is petitioner's burden, as the party seeking relief from the status quo of the appellate judgment, to demonstrate * * * equitable entitlement to the extraordinary remedy of vacatur." *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 26 (1994). As the Court had long held, vacatur is proper only where a case became moot "'through happenstance'—that is to say, * * * 'due to circumstances unattributable to any of the parties.'" *Id.* at 23 (quoting *Karcher* v. *May*, 484 U.S. 72, 82-83 (1987)). A party may not obtain vacatur, in contrast, where it "caused the mootness by voluntary action," because that voluntary action "surrender[s] [petitioner's] claim to the equitable remedy of vacatur." *Id.* at 24-25; *see Alvarez* v. *Smith*, 558 U.S. 87, 95 (2009); *Karcher*, 484 U.S. at 82-83.

If the Court concludes that this case is moot, that outcome is plainly the result of the Government's "voluntary action," not mere "happenstance." From start to finish, the Government controlled the "temporal scope" of EO-2. Moreover, it has declined every effort to hasten resolution of this dispute, including by failing to "request[] that [the Court] expedite consideration of the merits." *Trump* v. *Int'l Refugee Assistance Project* ("*IRAP*"), 137 S. Ct. 2080, 2086 (2017) (per curiam); *see* Resp. Br. 27. It would be profoundly inequitable to permit the Government to control the timing of the case in this manner and then to use any resulting mootness to obtain the very relief it sought on the merits: vacatur of the injunction. *See Bancorp*, 513 U.S. at 27 (stating that vacatur may not be used as "a refined form of collateral attack on the judgment").

The lower court orders continue to play a vital role in guarding "the public interest." *Id.* They protect respondents and countless other Americans from the harms that would be inflicted if the President decided to resume the bans imposed by EO-2. *See IRAP*, 137 S. Ct. at 2087.[2] The Court should not use its equitable

[2] The Government has previously made clear that, in its view, an injunction forecloses only the policies specifically enjoined. *See* U.S. Resp. to Mot. to Enforce Preliminary Injunction 1-2, 5-6, *Washington* v. *Trump* (W.D. Wash. Mar. 14, 2017) (No. 17-141). Thus, only the lower court's injunction against EO-2 would prevent the President from reimposing the bans in EO-2.

power to vacate those judgments. At a minimum, it plainly should not vacate the injunction against Section 6(a) prior to the actual expiration of the refugee ban.

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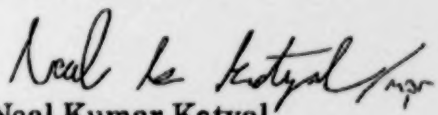
For the foregoing reasons, the case should be rescheduled for argument and adjudicated on the merits. In the alternative, the writ of certiorari should be dismissed as improvidently granted.

Respectfully submitted,



Neal Kumar Katyal
Counsel for Respondents

cc: Counsel of Record